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IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 71-725

RICHARD A. SCHOOR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

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Attorney for Petitioner
Richard A. Schoor

IN THE

SUPREME COURT OF THE UNITED STATES

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RICHARD A. SCHOOR,

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IN THE

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NUMBER ____

RICHARD A. SCHOOR,

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PETITION FOR WRIT OF CERTIORARI

TO THE

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THE FIFTH CIRCUIT

Petitioner, RICHARD A. SCHOOR, requests that a Writ of Certiorari issue to review *United States v. Schoor*, No. 71-1596 (5th Cir. September 13, 1971), ___ F.2d___. (Appendices I and IA), rendered by

the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, on September 13, 1971, affirming the conviction of the Petitioner, Petition for rehearing denied on November 4, 1971 (Appendix II).

OPINIONS BELOW

A copy of the opinion from the Fifth Circuit Court of Appeals, No. 71-1596, September 13, 1971, _____F.2d_____, affirming the Petitioner's conviction is attached as Appendix I and Appendix IA. (Petition for Rehearing denied November 4, 1971 (Appendix II).

JURISDICTION

On September 13, 1971, the United States Court of Appeals for the Fifth Circuit in No. 71-1596 (Appendices I and IA), affirmed the judgment, conviction and sentence of the Petitioner in the United

States District Court for the Northern District of Texas (Petition for Rehearing denied November 4, 1971, Appendix II).

Petitioner submits that Title 28 U.S.C. § 1254 (1), confers jurisdiction on this Court.

Jurisdiction is further urged pursuant to Rule 19(1)(b), Supreme Court Rules, because the United States Court of Appeals for the Fifth Circuit has:

a. Decided a Federal question in a way in conflict with the applicable decisions of the Seventh Circuit Court of Appeals.

b. Decided a Federal question in a way in conflict with the applicable decisions of this Court.

c. Decided a Federal question in a way which denied the Petitioner due process and the right to a jury trial.

QUESTION PRESENTED

Did the District Court err in permitting the jury to separate overnight with their spouses during deliberations over defendant's objection without admonishing said jury when prior to said separation defendant's counsel advised the Court that he had seen the spouses of various jurors talking to the plaintiff's witnesses during the jury's deliberations; contrary to the Fifth and Sixth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, Constitution of the United States, 1791.

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, Constitution of the United States, 1791.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 18 U.S.C. § 2312

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

Title 18 U.S.C. § 2313

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving

as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

On March 1, 1971, the Petitioner SCHOOR was brought to a jury trial in the United States District Court for the Northern District of Texas pursuant to Title 18, U.S.C. § 3231, being charged with violating 18 U.S.C. § 2312 and 18 U.S.C. § 2313. On March 3, 1971, the jury reported that they could not reach a verdict as to the alleged violation of 18 U.S.C. § 2312, but did find the Petitioner guilty with respect to the alleged violation of 18 U.S.C. § 2313.

The specific issue involved in this

Petition is whether or not the trial court judge committed error in permitting the jury to separate overnight with their spouses during deliberations over defendant's objection without admonishing said jury when prior to said separation defendant's counsel advised the Court that he had seen the spouses of various jurors talking to plaintiff's witnesses during the jury's deliberations.

Following the closing arguments the jury was instructed by the Court (R 360). The jury then retired for deliberations but the bailiff in charge of the jury was not sworn by the Court. During deliberations, the jury sent a note to the Court requesting certain testimony and the Court sent back a note in reply with the requested information (R 375 and 376). By approximately 9:30 p.m. on the evening of March 2, 1971,

the jury had not come in with a verdict. The trial court judge, having already left the courthouse for that evening, had a conversation by phone with both plaintiff's and defendant's counsel at approximately 9:30 p.m. that same evening. Defendant's counsel objected to a separation of the jury overnight and requested that they be held together under control of the bailiff until deliberations resumed on the following morning. Defendant's counsel advised the Court that various spouses of the jurors were seen talking to plaintiff's witnesses during the jury's deliberations and therefore felt it would be prejudicial to the defendant for these jurors to go home with said spouses in the midst of deliberations. Notwithstanding defendant's objection, the Court permitted the jury to separate overnight without being admonished and advised defendant's

counsel to place his objections in the record the following morning. Defendant's counsel did so the following morning (R 380 through 382).

After further deliberations that same morning, the jury reported that they could not reach a verdict as to the alleged violation of 18 U.S.C. § 2312 but did find the Petitioner guilty with respect to the alleged violation of 18 U.S.C. § 2313.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A. Conflict With Other Circuits

There is obviously a conflict between the various circuit courts of appeal regarding the question as to whether or not it is reversible error to permit a jury to separate overnight during its deliberations over a defendant's objection. It was held in *United States v.*

Panczko, 353 F.2d 676 (7th Cir. 1965), cert. denied 383 U.S. 935, that it is reversible error to permit a jury in a noncapital felony case to separate overnight during its deliberations over the defendant's objection.

The Court also held in *United States v. D'Antonio*, 342 F.2d 667 (7th Cir. 1965) that the separation of a jury during deliberation calls for a reversal of the case. The Court went on to state in *D'Antonio*:

> "At no time is it more essential that the jury should be immunized from outside influences than when it is engaged in deliberating upon what its verdict is to be. During that critical period, when jurors are engaged in resolving vital issues between the government and the defendant, the judge certainly should not relax the traditional safeguards against outside intrusion. Disbursement into the night of a group of men and women who have been deliberating in the security of the courthouse subjects them to the risk of being

> individually importuned, if not threatened, by telephone calls or personal contacts."

The Court also noted in *D'Antonio* that the jury was not admonished personally by the judge with defense counsel present prior to said separation.

A recent decision of the Fifth Circuit seems, at first blush, to be in direct opposition. It is true that the Court held in *Tyler v. United States*, 397 F.2d 565 (5th Cir. 1968) that it is not reversible error for the district court to allow jurors to separate overnight after they had begun their deliberations. However, the fact situation in the *Tyler* case is quite different from the fact situation at hand and therefore can be easily distinguished upon the following three points:

1. In the *Tyler* case, the defendant made no objection at the time of the separation of the jury for the reason

that he felt he could not have done so in the presence of the jurors without incurring their prejudice, and so the defendant, in the *Tyler* case, made a general objection to the separation on the following morning. However, in the instant case, the defendant's attorney did object upon specific grounds to the separation at the time of said separation by stating his objections to the Judge, over the telephone, and incorporated his objection in the record the following morning at the judge's suggestion. Thus, a lacking objection in the *Tyler* case was present in the instant case.

2. The defendant, in the *Tyler* case, did not suggest that there had been any actual prejudice as a result of the separation. However, in the instant case, the defendant's attorney did indicate to the Court that his client would be prejudiced as a result of the

separation of the jury during deliberations noting that spouses of the jurors had been in conversation with plaintiff's witnesses during the jury's deliberation. Thus, the element of prejudice was present in the instant case as opposed to the *Tyler* case.

3. The trial court, in the *Tyler* case, gave full, explicit and correct instructions in the form of an admonishment to the jurors before allowing them to disburse. In the instant case, no instructions or admonishments were given to the jurors just prior to their separation. In fact, the trial court judge was not present in the courtroom when the jurors did in fact separate for the evening. No admonishment of any sort was given to the jurors immediately prior to said separation. Therefore the case on hand is easily distinguished on this point from the *Tyler* case.

Other circuits have also considered this question and have held that a separation of the jury is not necessarily reversible error. However a careful reading of the opinions in these other circuits, would also distinguish those cases from the instant case.

For example, the Court in *United States v. Acuff*, 410 F.2d 463 (6th Cir. 1969) upheld the trial court which had permitted the separation of the jury during deliberations. However, the court stated in Acuff:

> "We find that the trial court properly exercised its discretion and we find no error in permitting the jury to separate *under proper admonition*." (Emphasis supplied.)

Therefore, the Court in upholding the separation, in effect stated that in order to cure any error in such separation there must be an admonishment to the jury. As pointed out above, there

was no admonishment in the instant case.

See also the case of *United States v. Breland*, 376 F.2d 721 (2nd Cir. 1967) which permitted separation. However, in that case, the defense counsel did not put forward any specific grounds of objection, merely indicating that "there might be some impropriety". This is obviously different from the instant case in which defense counsel specifically stated that defendant would be prejudiced because of conversations held between spouses of jurors with plaintiff's witnesses prior to said separation. It should also be noted that in the *Breland* case, the jury was admonished prior to the separation.

The Court also permitted separation in *Hines v. United States*, 365 F.2d 649 (10th Cir. 1966). However, in the *Hines* case, the jury was properly admonished and in addition there was no objection

to said separation by the defense counsel.

Additionally, the Court in *Cardarella v. United States*, 375 F.2d 222 (8th Cir. 1967) also permitted separation. However, there too, there was no objection to separation by defense counsel and additionally there was an admonishment by the trial court judge prior to separation.

The instant case is therefore easily distinguished in that there was objection to the separation by defense counsel upon stated grounds and notwithstanding said objection there was no admonishment to the jury by the trial court judge prior to permitting separation of said jury overnight.

B. Conflict With This Court

The United States Supreme Court has discussed separation of jurors and noted in *Remmer v. United States*, 347

U.S. 227 (1954) that a private communication between a third party (and the spouse of a juror is considered a third party) and a juror gives rise to a presumption of prejudice. The Court went on to state in *Remmer* that while the presumption may be rebuttable, the burden rests heavily upon the government to establish that outside contact with a juror was harmless to the defendant. There is no indication in the instant case that the government in any way met the presumption of prejudice. Counsel for defendant stated to the Court that he had personally observed spouses of the jurors talking to witnesses of the plaintiff. These jurors were then permitted to go home overnight with said spouses. The presumption of prejudice therefore arises. However plaintiff's attorney did nothing to rebut such presumption and therefore it must be assumed that the

defendant was prejudiced by said separation.

CONCLUSION

In affirming, the United States Court of Appeals for the Fifth Circuit issued no opinion. In effect the Fifth Circuit has held that a defendant in a criminal case never has a right to have a jury sequestered during its deliberations, no matter what the circumstances. In view of the conflicting opinions of the various Circuits, it is difficult, if not impossible, for a trial court judge to know under what circumstances a defendant does or does not have the right to a sequestered jury during deliberations. The time is ripe for this Court to rule finally on this point.

The jury in the instant case was obviously unsure of what verdicts to

bring in as is evidenced by their long period of deliberation and the fact that they were hung on one Count. Permitting said jury to separate overnight violated the Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States and violated his right to a trial under the Sixth Amendment of the Constitution of the United States.

The rulings of the District Court and the United States Court of Appeals for the Fifth Circuit should be reviewed. Accordingly, Petitioner urges this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and urges that his conviction be reversed by this Court.

Respectfully submitted,

/s/ Norman E. Green

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111 West Monroe
Phoenix, Arizona 85003

Attorney for Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 71-1596
Summary Calendar

D. C. Docket No. CR 5-366

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD A. SCHOOR,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

J U D G M E N T

This cause came on to be heard on

the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and ~~adjudged~~ by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

September 13, 1971

Issued As Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1596
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RICHARD A. SCHOOR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas.

(September 13, 1971)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1596

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD A. SCHOOR,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 13, 1971, 5 Cir., 1971, ____ F.2d ____).

(November 4, 1971)

Before GEWIN, GOLDBERG, and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

RICHARD A. SCHOOR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT OF SERVICE

NORMAN E. GREEN, counsel for Petitioner, being first duly sworn, deposes and says:

That in accordance with Rule 33(2)(a), Supreme Court Rules, he has mailed with air mail postage prepaid 2 copies of the following documents to the United States Attorney for the Northern District

of Texas, Dallas, Texas, and has forwarded by air mail postage prepaid 2 copies of the following documents to the Solicitor General, Department of Justice, Washington, D.C., 20530, on this 29th day of November, 1971:

(1) Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

(2) Affidavit of Service.

/s/ Norman E. Green
Norman E. Green

SUBSCRIBED AND SWORN to before me this 29th day of November, 1971.

/s/ William H. Howard
Notary Public

My Commission Expires:

May 28, 1974

No. 71-725

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD A. SCHLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-725

RICHARD A. SCHOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of having concealed an aircraft known to have been stolen, which was moving in interstate commerce, in violation of 18 U.S.C. 2313.[1] On March 31, 1971, petitioner was sentenced to three years' imprisonment, with eligibility for parole at any time

[1] The jury was unable to agree on a separate count under 18 U.S.C. 2312 charging the unlawful transportation of the aircraft.

under 18 U.S.C. 4208(a). The court of appeals affirmed without opinion (Pet. App. IA).

The sole issue raised here is whether the trial court erred in permitting the jury to separate after it had commenced deliberation. At the conclusion of the two-day trial, the court stated that it would let the jurors "set their own schedules" as to the length of that evening's deliberations (Tr. 372).[2] The jurors were admonished not to discuss the case or disclose any conclusions they might have reached concerning the verdict (Tr. 371-372). At 9:30 p.m., the jury requested a recess until the following morning. Petitioner's counsel objected to separation of the jury, alleging that a number of the jurors' spouses had been reportedly seen conversing with government witnesses; and that, if these jurors were released from the control of the bailiff, it would be prejudicial to petitioner (Tr. 380-381). The trial judge overruled the objection and permitted the jury to separate. The following morning, after further deliberations, the jury returned its verdict.

Petitioner contends that the trial court committed reversible error in permitting the jury to separate, particularly since they were not admonished immediately prior to the evening recess. However, during the course of the trial, the court had repeatedly warned the jury not to allow anyone to talk with them about the case and more specifically not to discuss the case with their families (Tr. 51, 166, 269,

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[2] "Tr." designates the one-volume trial transcript which we are filing herewith.

371-372). There is nothing to suggest that the jurors disregarded this admonition or that improper influences affected the jury's decision. Nor does petitioner suggest any specific instance of misconduct; he contends rather that the court's actions presented the opportunity for prejudice. There is no reason to conclude that the court abused its discretion in permitting separation absent any showing of actual prejudice. See *Tyler* v. *United States*, 397 F. 2d 565, 569 (C.A. 5), certiorari denied, 394 U.S. 917.[3]

All the courts of appeal which have been presented with the issue, other than the Seventh Circuit,[4] have held that whether a jury in a non-capital case should be sequestered rests within the sound discretion of the trial court. See, *e.g.*, *United States* v. *Acuff*, 410 F. 2d 463, 466-467 (C.A. 6), and cases there cited, certiorari denied, 396 U.S. 830. This Court has not previously deemed it necessary to reconcile the difference among the circuits on this matter; and there is nothing special in this case to require any different approach.

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[3] That the jurors were not prejudiced against petitioner by virtue of the separation is indicated by the fact that there was a disagreement on one of the counts.

[4] See *United States* v. *Panczko*, 353 F.2d 676 (C.A. 7), certiorari denied, 383 U.S. 935, and *United States* v. *D'Antonio*, 342 F.2d 667 (C.A. 7) (holding that this practice automatically requires reversal).

It is therefore respectfully submitted, that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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